BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DUANE DAVIS	)	
Claimant	)	
	)	
VS.	)	
	)	
PRESTIGE, INC.	)	
Respondent	)	Docket No. 1,017,064
	)	
AND	)	
	)	
LIBERTY MUTUAL INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Claimant requested review of the August 17, 2006 Award by Special Administrative Law Judge (SALJ) Marvin Appling. The Board heard oral argument on November 15, 2006.

APPEARANCES

William L. Phalen, of Pittsburg, Kansas, appeared for the claimant. John R. Emerson, of Kansas City, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

At oral argument, the parties' stipulated that the 12 percent body as a whole functional impairment assessed by the SALJ was appropriate and no longer in dispute. The parties also agreed that claimant began his post-injury job in October 2004 earning $350 per week.

ISSUES

The SALJ denied claimant's request for permanent partial general disability, a disability greater than the functional impairment, reasoning that "[t]he [c]laimant is now

working as a tinter here in Wichita and he makes less than 90% of what he was earning before, but it looks like the job will improve as he continues to up the job skill."[1]

The claimant requests review of the SALJ's denial of his claim for work disability. Claimant maintains the evidence clearly establishes that he has yet to return to comparable employment following his work-related injury. And with his actual wage loss of 19 percent and a 51 percent task loss, based upon Dr. Prostic's testimony, he is entitled to a 35 percent work disability.[2]

Respondent argues that the ALJ's Award should be affirmed, albeit for a different legal reasoning. Respondent maintains claimant failed to exhibit good faith in complying with respondent's attendance policy, which caused respondent to fire claimant on June 16, 2004. And because claimant failed to put forth a good faith effort in maintaining his employment, respondent argues that the finder of fact is authorized to impute his wages from that employment and as such, he would not be entitled to a work disability award. Alternatively, respondent suggests that claimant is purposefully underemployed and is capable of earning far more than the $350 per week he presently earns.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board finds the SALJ's Award should be modified.

Claimant sustained a compensable injury to his low back on April 13, 2004. He was provided with treatment and returned to work under temporary restrictions. After respondent provided an accommodated position, claimant maintains he continued to suffer from low back pain and increased symptoms. On April 22 and 23, claimant called in to his employer and reported that he would be unable to work. On each of these dates claimant was assessed 2 points pursuant to respondent's attendance policy. Then, on Monday, April 26, 2004, claimant was seen by respondent's physician and was taken off work. No work release was provided for April 22 or 23.

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[1] ALJ Award (Aug. 17, 2006) at 3.

[2] Claimant's Brief (filed Sept. 22, 2006). Claimant initially argued that his wage loss was 28 percent, when comparing his post-injury wages of $350 per week to his pre-injury wages of $389.65. During the course of trying this claim, the parties agreed on the value of benefits, $40.62 per week, which ceased as of claimant's termination from respondent's employ on June 17, 2004. Because claimant's employment was terminated, the value of those benefits must be included in the claimant's average weekly wage. And when that sum is added to the base wages, the resulting wage loss is 19 percent, as of October 1, 2004, the date claimant began working following his termination from respondent's workplace.

On May 14, 2004, claimant was assessed 3 points for failing to appear for work or call in before his shift. Claimant testified that he believes he was either tending to his wife who was having surgery, or taking care of his son that day. In any event, his absence was never excused. On June 16, 2003, claimant was assessed another 3 points for failing to call in or appear at work as required by the attendance policy. Claimant believes he was unable to work that date due to back pain. As of June 16, 2004, claimant had accrued in excess of 12 points and as a result, his employment was terminated.[3] Claimant was not yet at maximum medical improvement (MMI) from his work-related injury.

Claimant does not dispute that he failed to appear for work on the days at issue. Rather, claimant contends that some of his absences were due to his work-related injury, particularly April 22 and 23, and that he should not have been assessed points based on his inability to work.

On September 30, 2004, Dr. Steven Gaede, the treating physician, released him at MMI. He imposed restrictions of "medium work duty, in other words lifting up to 45 pounds on an occasional basis during the day with no repetitive bending and stooping."[4] At this point claimant was no longer employed by respondent and was in the process of looking for a job. According to his list, which contains only names and telephone numbers, he looked at 39 places for employment. Claimant testified the list covers the period both before he obtained his present position with AZ Window Tinting and Alarms (AZ Window) in October 2004 and after.

Claimant testified he continues to look for alternative employment even though he presently works for AZ Window and earns $350 per week in salary. His present job requires him to work as many as 48 hours per week, and he receives no benefits or overtime. He is, however, able to accommodate his physical limitations. Respondent asserts that claimant's wages are artificially low, and that according to Karen Terrill, claimant could and should be earning $8.00 an hour plus overtime, which would yield a post-injury average weekly wage of $416.00, a figure that constitutes a comparable wage.

At his attorney's request, claimant was evaluated by Dr. Edward J. Prostic for purposes of establishing a task loss as required by K.S.A. 44-510e(a). According to Dr. Prostic, claimant sustained a 51 percent task loss based upon the vocational analysis provided by Karen Terrill. At respondent's request Dr. Gaede was also asked to consider claimant's task loss utilizing Ms. Terrill's vocational analysis. According to Dr. Gaede, claimant bears a 45 percent task loss based upon his own restrictions which are remarkably similar to those offered by Dr. Prostic. According to Dr. Gaede, claimant should lift up to 45 pounds occasionally and avoid repetitive bending or stooping.

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[3] Claimant had accrued 2 points before the date of his injury.

[4] Gaede Depo., Ex. 2 at 1-2 (Report dated Sept. 30, 2004).

Following a regular hearing[5], the SALJ issued an Award granting claimant a 12 percent functional impairment, a finding that is not disputed. He denied claimant's request for a work disability, reasoning that although the claimant is working and making less than 90 percent of what he was earning, that will change as the claimant continues to increase his job skills.

When an injury does not fit within the schedules of K.S.A. 44-510d, permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a), which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

That statute must be read in light of *Foulk*[6] and *Copeland*.[7] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the predecessor to the above-quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e(a)

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[5] The Regular Hearing was held on August 23, 2005 before ALJ Thomas Klein. The Award was issued on August 17, 2006, nearly a year later, and authored by the SALJ.

[6] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[7] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

(Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than actual earnings when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages.[8]

The Board finds that the SALJ's conclusion with respect to the adequacy of claimant's post-injury wage is contrary to the provisions of K.S.A. 44-510e(a). Claimant has, in fact, sustained a wage loss in excess of 10 percent of his pre-injury average weekly wage. Whether and to what extent those wages increase over the coming years should be the focus of a Review and Modification proceeding and is not an appropriate justification for denying work disability.

The Board is likewise unpersuaded by respondent's contention that claimant is purposefully underemployed in his position as a tinter. It is uncontroverted that claimant has secured employment that accommodates his restrictions. He works in a service-related industry and is available as much as 48 hours per week, sometimes even 60 hours per week. There are some weeks he is not required to work as much but is still paid his weekly $350 salary. Respondent contends this cannot pass the "stink"[9] test as claimant's effectively hourly rate, based on an average of 48 hours per week, is far less than the federal minimum wage rate of $5.15 per hour. Based upon these facts alone, the Board finds nothing within this arrangement that would suggest that claimant is effectively underemployed or failing to act in good faith by working at this job. If the claimant had refused this employment presumably respondent would argue that would constitute a lack of good faith. Thus, based upon this argument, the Board finds no reason to utilize any figure other than claimant's actual wages for purposes of calculating a work disability.

Turning now to the primary dispute between the parties, respondent stridently argues that claimant violated its attendance policy and was properly terminated for that violation. And that failure demonstrates a lack of good faith which authorizes the factfinder to impute the wages that respondent was paying at the time of claimant's termination.[10]

The good faith of an employee's efforts to find or retain appropriate employment is determined on a case-by-case basis.[11] Here, the claimant was not yet at maximum

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[8] *Id.* at 320.

[9] Respondent's Brief at 6 (filed Oct. 11, 2006).

[10] *Guerrero v. Dold Foods, Inc.*, 22 Kan. App. 2d 53, 913 P.2d 612 (1995).

[11] *Parsons v. Seaboard Farms, Inc.*, 27 Kan. App. 2d 843, 9 P.3d 591 (2000).

medical improvement, but was being accommodated. But he was, on some occasions, unable to work, according to him, due to his injury. Two of those occasions, April 22 and 23, were immediately before he sought treatment from the respondent's physician and was taken off work. It seems reasonable to find that if an employee is injured on April 13 and thereafter is unable to work, and on April 26 and is taken off work by respondent's designated physician, absent another unrelated intervening accident, then the two immediately earlier dates which claimant attributes to that same injury should likewise be excused. But respondent was merely enforcing its attendance policy, something that claimant was familiar with in advance. Claimant could have obtained the requisite off work excuse from the doctor. The Board finds that respondent's decision to enforce its attendance policy does not equate to a showing of bad faith on either respondent's or claimant's part, nor does it require a denial of work disability under these facts and circumstances. Accordingly, claimant's actual wages following his termination will be utilized for purposes of the work disability computation. From June 17, 2004 to October 1, 2004, claimant had a 100 percent wage loss. Upon re-employment on October 1, 2004, he began earning $350 per week, which represents a wage loss of 19 percent.

The Board has considered the task loss opinions offered by the physicians and finds neither is any more persuasive than the other. And as such, an average of the two, 48 percent, will be used for purposes of calculating the work disability.

From June 17, 2004 to October 1, 2004, claimant had a 74 percent work disability. Then, from October 1, 2004 and ongoing, the claimant has a 33.5 percent work disability.

The Board notes that although the ALJ awarded claimant's counsel a fee for his services, the record does not contain a fee agreement between claimant and his attorney. K.S.A. 44-536(b) requires that the Director review such fee agreements and approve such contract and fees in accordance with that statute. Should claimant's counsel desire a fee be approved in this matter, he must submit his contract with claimant to the ALJ for approval.

All other findings are hereby adopted by the Appeals Board as if fully set forth herein to the extent they are not inconsistent with the above.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Special Administrative Law Judge Marvin Appling dated August 17, 2006, is modified as follows:

The claimant is entitled to 16.16 weeks of temporary total disability compensation at the rate of $326.45 per week or $5,275.43 followed by 9.14 weeks of permanent partial disability compensation at the rate of $326.45 per week or $2,983.75 for a 12 percent functional disability followed by 15.14 weeks of permanent partial disability compensation

at the rate of $326.45 per week or $4,942.45 for a 74 percent work disability followed by 114.36 weeks of permanent partial disability compensation at the rate of $326.45 per week or $37,332.82 for a 33.50 percent work disability, making a total award of $50,534.45.

As of December 6, 2006 there would be due and owing to the claimant 16.16 weeks of temporary total disability compensation at the rate of $326.45 per week in the sum of $5,275.43 plus 121.97 weeks of permanent partial disability compensation at the rate of $326.45 per week in the sum of $39,817.11 for a total due and owing of $45,092.54, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $5,441.91 shall be paid at the rate of $326.45 per week for 16.67 weeks or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of December, 2006.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
John R. Emerson, Attorney for Respondent and its Insurance Carrier
Marvin Appling, Special Administrative Law Judge
Thomas Klein, Administrative Law Judge

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LIBERTY MUTUAL INSURANCE CO.	)	
Insurance Carrier	)	

ORDER NUNC PRO TUNC

It has come to the attention of the Board that a clerical error was made in the Board Order in the above-captioned matter issued on December 6, 2006. Specifically, in the calculation of the award, which was inadvertently calculated at the incorrect rate. The Award should read as follows:

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Special Administrative Law Judge Marvin Appling dated August 17, 2006, is modified as follows:

The claimant is entitled to 16.16 weeks of temporary total disability compensation at the rate of $286.86 per week or $4,635.66 followed by 9.14 weeks of permanent partial disability compensation at the rate of $286.86 per week or $2,621.90 for a 12 percent functional disability followed by 15.14 weeks of permanent partial disability compensation at the rate of $286.86 per week or $4,343.06 for a 74 percent work disability followed by 114.36 weeks of permanent partial disability compensation at the rate of $286.86 per week or $32,805.31 for a 33.50 percent work disability, making a total award of $44,405.93.

As of January 4, 2007 there would be due and owing to the claimant 16.16 weeks of temporary total disability compensation at the rate of $286.86 per week in the sum of $4,635.66 plus 126.12 weeks of permanent partial disability compensation at the rate of

$286.86 per week in the sum of $36,178.78 for a total due and owing of $40,814.44, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $3,591.49 shall be paid at the rate of $286.86 per week for 12.52 weeks or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of January, 2007.

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BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
John R. Emerson, Attorney for Respondent and its Insurance Carrier
Marvin Appling, Special Administrative Law Judge
Thomas Klein, Administrative Law Judge